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No. _____

In The

Supreme Court of the United States

CHRISTINE ANN BRACKETT,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *California Penal Code Section 653.22*, criminalizing loitering in a public place with intent to commit prostitution, is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment, in light of this Supreme Court's decisions in cases such as *City of Chicago v. Morales* and *Kolender v. Lawson*.

2. Whether this same statute is unconstitutionally overbroad in that it impermissibly inhibits the exercise of free speech and expression rights under the First Amendment and Under the Due Process Clause of the Fourteenth Amendment.

PARTIES

The parties are: Petitioner, Christine Ann Brackett; and the Respondent, the State of California.

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OPINIONS BELOW

The unpublished opinion of the Appellate Division of the Superior Court, State of California, County of Los Angeles is annexed hereto at App. 1-4. The unpublished Denial of Petitioner's Petition for Writ of Habeas Corpus by the California Court of Appeal, Second Appellate District, Division Four, is annexed hereto at App. 5. The unpublished March 15, 2000, Denial of Petitioner's Petition for Review by the California Supreme Court is annexed hereto at App. 8.

JURISDICTION

The judgment of the Appellate Division of the Superior Court was entered on November 3, 1999, App. 1. Petitioner's Petition for Writ of Habeas Corpus, filed with the Court of Appeal on December 28, 1999, was denied by the Court of Appeal on January 4, 2000, App. 5. The Petition for Writ of Habeas Corpus was timely filed with the Court of Appeal, as it was within 60 days – as required by California law, *People v. Superior Court of Kern County (Brent, Real Party in Interest)*, 2 Cal. App. 4th 675, 682 (1992) – of the decision of the Appellate Division of the Superior Court, the court whose ruling the Petition sought to overturn. Petitioner filed a Petition for Review of the Court of Appeal's denial of the Petition for Writ of Habeas Corpus with the California Supreme Court on January 13, 2000, App. 6. The Petition for Review was timely filed with the California Supreme Court because it was filed within ten days of the Court of Appeal's denial

of the Petition for Writ of Habeas Corpus, *California Rules of Court Sections 24(a)* and *28(b)*.

The denial by the California Court of Appeal for the Second Appellate District, Division Four, of the Petition for Writ of Habeas Corpus was a ruling on the merits by a court empowered to so rule. Thus, this Court is hereby respectfully petitioned to direct *Certiorari* to the California Court of Appeal, for the Second Appellate District.

The California Supreme Court denied Review on **March 15, 2000**, App. 8. The Jurisdiction of this Court is invoked pursuant to *28 U.S.C. Section 1257*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The full text of *California Penal Code Section 653.22* is annexed hereto at App. 18-19.

STATEMENT OF THE CASE

Petitioner was arrested on May 1, 1998, for loitering in a public place with the intent to commit prostitution, a misdemeanor, under *California Penal Code Section 653.22*. The case was assigned to the Los Angeles Municipal Court, West Los Angeles Branch, People v. Brackett, Case No. 8WL01992. On May 29, 1998, Petitioner pleaded not guilty. A pre trial hearing was set for July 2, 1998. On June 22, 1998, Petitioner filed a Motion to Dismiss, based upon the contention that the statute was unconstitutionally vague and overbroad.

On June 24, 1998, the prosecution responded by pointing out that since the only California Court of Appeal construal of this statute, *People v. Pulliam*, 62 Cal. App. 4th 1430 (1998), upheld its constitutionality, no trial level court in the state could rule in a contrary way. The prosecution was correct on this point. On July 2, 1998, the Municipal Court, after first obtaining a stipulation from Petitioner that *Pulliam* was the only California Court of Appeal case currently in existence that had adjudicated the constitutionality of the statute, denied Petitioner's Motion to Dismiss. Petitioner then and there pleaded no contest to the charge and was right away sentenced to

community service, probation, and payment of a restitution fee to the State of California.

Petitioner then timely appealed to the Appellate Division of the Superior Court for Los Angeles County, which hears appeals from the Municipal Courts. Since the Appellate Division of the Superior Court is considered part of the Superior Court, which is a trial court, the Appellate Division could not rule contrary to the panel of the California Court of Appeal that upheld the constitutionality of the statute in *Pulliam, Auto Equity Sales Inc. v. Superior Court of Santa Clara County (Hesenflow, Real Party in Interest)*, 57 Cal.2d 450, 455-456 (1962). However, another panel of the California Court of Appeal is empowered to rule differently than the panel that upheld the constitutionality of the statute, *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 footnote 4 (1987).

Thus, Petitioner did not ask the Appellate Division to rule the statute unconstitutional. She asked the Appellate Division to certify the case to the Court of Appeal for the Second Appellate District, governing the Los Angeles area, which branch of the Court of Appeal would be empowered to construe the statute differently than the Court of Appeal sitting in San Diego, which rendered the *Pulliam* decision that upheld the constitutionality of *Penal Code Section 653.22*.

In misdemeanor cases arising from the Municipal Courts in California, there is no right of appeal to the California Court of Appeal. To get to the Court of Appeal, the Appellate Division of the Superior Court for the county in question has to certify the case for transfer to the governing Court of Appeal, either on its own or upon

application of any party to the case, *California Rules of Court Sections 63(a)* and *(b)*. Petitioner moved for such certification well before the expiration of the time limit in which to do so by including the request for certification in her opening brief to the Appellate Division.

Another way for the Court of Appeal to take over an appeal from the Appellate Division of the Superior Court is for that Court of Appeal to decide on its own to take the case. However, this can only happen if the Appellate Division notifies the Court of Appeal that the Appellate Division's opinion will be published, *California Rules of Court, Sections 62(a)* and *(b)*. Since the Appellate Division's opinion in the instant case was not for publication, the Court of Appeal could not take over the appeal.

In both her brief to the Appellate Division and in oral argument, Petitioner argued that *Penal Code Section 653.22* is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and that it is also unconstitutionally overbroad in that it impermissibly inhibits free speech and expression rights under the Due Process Clause and under the First Amendment. In arguing for certification to the Court of Appeal, Petitioner raised before the Appellate Division this Court's decisions in *Kolender v. Lawson*, 461 U.S. 352 (1983) and *City of Chicago v. Morales*, 119 S.Ct. 1849 (1999), among other cases. The Appellate Division of the Superior Court rejected Petitioner's request for certification to the Court of Appeal and explicitly held that this Court's decision in *Morales* was not applicable to *Penal Code Section 653.22*, App 3-4.

Since the Appellate Division refused to certify the case to the Court of Appeal, Petitioner's only remaining possibility of getting her case before the Court of Appeal was by way of a Petition for Writ of Habeas Corpus, *Witkin, California Procedure, 4th Edition, Volume 9, Appeal, Section 51, page 108; In Re Zerbe,* 60 Cal. 2d 666, 667 (1964).

In the Petition for Writ of Habeas Corpus, filed in the Court of Appeal, Petitioner made the constitutional arguments now presented before this Court. In denying the Petition for Writ of Habeas Corpus, the California Court of Appeal, Second District, Division Four, declared it's agreement with its colleagues in San Diego who decided the *Pulliam* case upholding the constitutionality of *Penal Code Section 653.22,* App 5. This Petition for Certiorari to the Court of Appeal for the State of California, Second Appellate District, is filed pursuant to denial of review by the California Supreme Court, App. 8.

REASONS FOR GRANTING THE WRIT

OVERVIEW

California Penal Code Section 653.22 sets forth an open ended basis for police to conclude that someone is conducting herself in a public place in a manner which evidences an intent to commit an act of prostitution. While it first sets forth some types of specific conduct that can be used as a basis for arrest and conviction, it then allows any criteria to be used. The specific types of conduct that the statute enumerates as a basis for a statutory violation also collide with expressive actions fully protected by the First Amendment. Some of the

actions that the statute declares to be a basis for arrest can be completely innocent. However, because the police are empowered to put their own interpretation on even the most innocent behavior, they can make an arrest, even if the arrestee is in a public place for an entirely lawful purpose. The statute also gives police such broad discretion as to run the risk of arbitrary and discriminatory enforcement.

A. The statute is unconstitutionally vague, because loitering in a public place with the intent to commit prostitution is not adequately defined so that people of common intelligence are fairly on notice as to all the types of conduct that could result in their being charged with a crime.

Penal Code Section 653.22(a) criminalizes loitering in a public place with the intent to commit prostitution. Intent is:

> "evidenced by acting in a manner and under circumstances which openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution." App. 18.

The statute then goes on to set forth a non-exclusive set of circumstances that may be considered in determining loitering with the intent to commit prostitution, *653.22(c)*, App. 19. In order to avoid both unconstitutional vagueness and overbreadth, a statute has to be clear in its definitions and avoid punishing otherwise legal conduct.

A statute is unconstitutionally vague if people of common intelligence have to guess at what types of conduct may be illegal, *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

B. The statute also sweeps so broadly and with such uncertainty that it may very well criminalize legally permissible and constitutionally protected modes of expressive activity.

The statute allows police to arrest someone if that person:

> "Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution." *653.22(b)(1)*, App. 18.

The *Pulliam* decision, cited by the Court of Appeal in denying Petitioner's Petition for Writ of Habeas Corpus, was wrong in rejecting the contention that such types of conduct could also encompass all sorts of constitutionally protected activity, such as people trying to obtain signatures for a proposed ballot measure or politicians trying to meet local people in the area, 62 Cal. App. 4th, at page 1436, footnote 4. The phrase "indicative of soliciting for prostitution" is too vague when applied to what could easily be a lawful purpose for initiating the communication in question.

Thus, the *Pulliam* decision did not give sufficient attention to the danger of the statute's being used to arrest people who are engaging in protected First

Amendment activity such as communicating with passersby for purposes of attempted persuasion on some issue or cause.

Any statute that may impinge on First Amendment freedoms does not enjoy the same initial benefit of the doubt as do other statutes facing constitutional challenge, *Ghafari v. Municipal Court of San Francisco*, 87 Cal. App. 3d 255, 265 (1978). Even if a statute may regulate in a certain area, it cannot try to achieve a permissible objective by unduly infringing upon protected freedoms, *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

The statute herein challenged further allows someone to be arrested if that person:

> "Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution." *653.22(b)(2)*, App. 18.

Not only can much of this be protected expressive activity, the California Supreme Court has explicitly stated that waving to a passing vehicle, nodding to a passing stranger, even if standing on a street corner in a mini skirt, could not, per se, be deemed a violation of California's prostitution laws, because such conduct is too ambiguous to even be the basis for an arrest, let alone a conviction, *People v. Superior Court of Alameda County (Hartway, Real Party in Interest)*, 19 Cal. 3d 338, 346 (1977).

C. The statute criminalizes mere presence in a public place if a person has had any type of prostitution conviction in the past five years, or previously engaged, within the last six months, in any of the activity described in the statute, even without sustaining any conviction in a court of law for such conduct.

Another factor that can be used by law enforcement to find that a person is loitering in a public place with the intent to commit prostitution is if that person has been convicted of violating this statute or any other prostitution law within the past five years, *653.22(b)(3)*, App. 18.

Thus, a person who has one conviction for prostitution that is four years and eleven months old, and has had no more recent convictions, could be arrested for being on the street, while walking toward a convenience store to buy a candy bar. Someone who has sustained any kind of prostitution conviction in the past five years, may thus be excluded from an area even if she wishes to be present in the area for an entirely lawful purpose.

People can be further arrested under this statute if they are in a public place and if they have, in the past six months, engaged in any of the above described behavior or any other behavior that a police officer might declare to be indicative of prostitution, *653.22(b)(5)*, App. 19. So, even if a person has not been convicted of any violation of this statute or of any other prostitution law, if a police officer merely claims to have seen the individual engaging in any of the statute's listed conduct, at any time within the past six months, the person is subject to arrest, without the police having to make any further showing of misconduct. Further, because of *653.22(c)*, someone can

also be arrested for any conduct whatsoever, whether or not that conduct has been enumerated in the statute, as *653.22(c)* allows for an open-ended reliance on any "relevant circumstances," without defining what those circumstances are, App. 19. In *Subsection (c)*, then, the statute permits a nonrestricted standardless basis for a police officer to deem someone to have been loitering with the intent to commit an act of prostitution.

In the Arrest Report, App. 15 and 16, the police state that prior to her arrest, Petitioner was warned not to work as a prostitute for sixty days in an area of Lincoln Boulevard near Machado Drive and Washington Boulevard. Yet, as shown immediately above, the statute authorizes arresting someone who appears in a public place and has been seen to have engaged in various types of behavior in the past six months, even if none of that behavior resulted in any conviction. Thus, even if Petitioner had been present in the off limits section of Lincoln Boulevard for an entirely legal reason, such as shopping or going to a restaurant in the area, she could still be arrested because the police claim they saw her within the past six months do various things mentioned in the statute.

Further, as also just shown, above, even if Petitioner had not engaged in any of the conduct that the statute enumerates, but merely engaged in any conduct that an arresting officer, acting with unlimited discretion, sought to deem loitering with intent to commit prostitution, she could still have been arrested, *653.22(c)*, App. 19.

Thus, the warning prior to her arrest, to not work as a prostitute in the prohibited area for 60 days, effectively

gave the police the opportunity to arrest her for any reason whatsoever, so long as she was physically present in this area, at any time after receiving the warning, even if her presence there was for an entirely lawful reason. Such a warning is further not even required by the statute. It allows for arrest and conviction if the police just claim to have seen a person engage in any behavior which the police want to claim is indicative of soliciting for prostitution, whether or not any warning prior to the arrest was ever given.

A California Court of Appeal struck down a condition of probation of a woman convicted of prostitution, which prohibited her from being in an entire area of the city in which her prostitution arrest occurred. That court pointed out that the probationer could be present in the prohibited area for an entirely legal reason and should not be prohibited from doing so, *In Re White*, 97 Cal. App. 3d 141, 147, 150 (1979).

Penal Code Section 653.22 is even more constitutionally offensive than the terms of probation struck down in *In Re White*, because it allows the police to impose a blanket geographic prohibition on a person, even though that person has not yet been convicted of anything.

This statute allows someone to be arrested for something as flimsy as having just waved at cars in the past six months. A person who has never been arrested, but who police claim they saw waving at cars, within the past six months, can also now be arrested for nothing more than just being in the police-prohibited area, regardless of what her true intent for being there really is, at the time

of her actual arrest. A person who hasn't even been seen by police to have waved at cars in the past six months, but who may have engaged in any other type of conduct, regardless of how innocent, could also be arrested for being in the police prohibited area, since the final subsection of the statute allows the police to use any factor they choose as a basis for charging someone with loitering with intent to commit prostitution, App. 19. The potential for arbitrariness in law enforcement, here, is beyond constitutional tolerance.

D. This statute offends basic notions of fundamental fairness and due process because it is ultimately reducible to mind reading. A person can essentially be arrested because the police insist that they know what is going on in her mind, regardless of her actual intent.

653.22(c) declares that the list of circumstances set forth in its *subsection (b)* is not exclusive, App. 19. It allows for any other relevant circumstance to be used to determine intent. It further declares that no one circumstance or combination of circumstances is determinative of intent, App. 19. It then says that intent must be determined on an evaluation of the particular circumstances of each case, App. 19. Thus, any one factor, whether set forth in the statute or not, regardless of how open ended, can be used, alone, in a given case, as a basis for arrest. Accordingly, the statute allows not only vague and very broad criteria to be the basis for an arrest, it even allows additional unspecified and unlimited circumstances to be relied upon by the police as a justification for arresting someone.

This statute is quite similar to an ordinance struck down for vagueness by this Court in *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971), which ordinance made it unlawful to wander about the streets or other public ways at late or unusual hours in the night without any visible or lawful business and without giving a satisfactory account of oneself. In a concurring opinion, Justice Stewart, joined by Justice Douglas, said that while such wanderings about the streets may arouse suspicion, such a circumstance, without more, cannot constitutionally amount to an actual criminal offense, 402 U.S., at page 546.

Since 653.22 does not restrict the types of actions that can be included in a police officer's assessment that a person is loitering with the intent to commit prostitution, virtually any conduct can be bootstrapped into a charge that the suspect in question is loitering for such a purpose. Sitting on a bus bench, just to relax, and thereby refraining from boarding any of the buses that stop at that bench, could be deemed loitering with the intent to commit prostitution. Even if a law can be passed to prohibit certain actions, that law may be deemed facially invalid if it seeks to prohibit an overly broad range of protected conduct, *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796, 798-799 (1984); *In Re Juan C*, 28 Cal. App. 4th 1093, 1099 (1994).

The vagueness and overbreadth of this statute, along with its open invitation to police officers to use the most arbitrary and amorphously defined criteria for arresting people, violate the Due Process Clause of the Fourteenth Amendment. A criminal statute is void for vagueness if

its prohibitions are not clearly defined and such vague laws may trap the innocent by not providing fair warning as to precisely what types of conduct are and are not prohibited, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

In *Kolender v. Lawson*, 461 U.S. 352, 353-354 (1983), this Court struck down as unconstitutional a California statute that required persons who loiter or wander on the streets to provide a "credible and reliable identification" and to account for their presence when requested to do so by a police officer. A person would be in violation of this statute if that individual could not provide "credible and reliable identification" as determined by a questioning police officer, 461 U.S., at pages 359-360.

This Court in *Kolender* deemed it unacceptable to allow individual police officers unbridled discretion in determining if a questioned person provided identification that was credible and reliable, because this "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat," 461 U.S., at page 360, and "confers on police a virtually unrestrained power to arrest and charge persons with a violation," *id.* Penal Code Section 653.22 also entrusts lawmaking to the moment-to-moment judgment of the police officer on the beat and confers on police a virtually unrestrained power to arrest and charge persons with a violation. 653.22 is therefore as unconstitutional as the statute this Court struck down in *Kolender*.

Legislatures must establish minimum guidelines to govern law enforcement. Where there is a failure to provide such minimum guidelines, a criminal statute is

unconstitutional because it permits a "standardless sweep that allows police, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S., at page 358.

Certainly, *653.22(c)*, App. 19, in its allowance of open ended and unlimited factors to be used by police, over and above the previously stated criteria in the statute, fails to provide any such minimum guidelines and thereby permits the type of standardless sweep found to be unconstitutional in *Kolender*.

E. This Court's decision last year in *City of Chicago v. Morales* casts doubt on statutes, such as *California Penal Code Section* 653.22, that fail to establish minimum guidelines to govern law enforcement activity.

The Appellate Division of the Superior Court refused to accept Petitioner's argument that this Court's decision in *City of Chicago v. Morales*, 119 S.Ct. 1849 (1999), casts doubt on such statutes as *Section 653.22*. The Appellate Division held that, contrary to the ordinance in *Morales*, *Penal Code Section 653.22* sets forth guidelines for determining whether a violation has occurred, App. 3-4. Petitioner, however, argued to the Appellate Division that the guidelines set forth in *653.22* are entirely vague, overbroad, and open ended.

The Chicago ordinance allowed a police officer to order all persons in a group to disperse, even if that officer reasonably believes that only one of that group is a criminal street gang member, 119 S.Ct., at page 1854, footnote 2, if that group is "loitering," with "loitering"

defined as remaining in any place with no apparent purpose, *id.* "Criminal street gang" was defined by the ordinance as three or more persons, either formally or informally associated, who come together for purposes of committing any of a series of enumerated crimes, *id.* This Court held that the Chicago ordinance violates the requirement that a legislature establish minimal guidelines to govern law enforcement, 119 S.Ct., at page 1861.

Section 653.22 also fails to establish meaningful guidelines for police. For instance, as already shown herein, loitering with intent to commit prostitution can be said to have taken place, justifying an arrest therefor, if the defendant in question has done nothing more than been convicted of any offense involving prostitution within the past five years, *653.22(b)(3)*, App. 18.

Such a person could be walking down the street to buy a newspaper and be arrested for loitering with the intent to commit prostitution, whether or not she actually ever intended to commit any act of prostitution.

Being subject to arrest, in the immediate moment, essentially just for having been convicted of a prostitution-related offense at some point in the past five years, allows police to re-punish people for what they did at some point within the past five years, even if they currently harbor no actual intent to commit any act of prostitution, at the time they are now being arrested. Surely, a statute that permits this is as unconstitutional as the one struck down by this Court in *Morales*.

As already pointed out in this Petition, the California Supreme Court has explicitly held that conduct which *653.22* criminalizes, such as waving to a passing vehicle

and/or nodding at a passing stranger, cannot be deemed a violation of California's prostitution statutes because such conduct is too ambiguous to even be the basis for an arrest, let alone a conviction, *People v. Superior Court of Alameda County (Hartway)*, 19 Cal.3d, at page 346. The California Supreme Court held that if these types of actions were even undertaken by someone standing on a street corner in a mini skirt, this type of conduct would still be entirely inadequate to constitute a basis for arrest and conviction for a prostitution-related offense, *id.*

In *Morales*, this Court explained that a statute can still be unconstitutional even if it does not threaten a substantial amount of constitutionally protected conduct, so long as that statute fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests, 119 S.Ct., at page 1857.

Given the way *653.22* overtly allows police to invoke such loose and amorphous criteria in what is essentially an attempt at mind reading, this statute surely runs afoul of the holding in *Morales*, which found unconstitutional any legislative enactment that fails to guard against the arbitrary deprivation of a liberty interest.

Concurring in *Morales*, Justice Kennedy stated that a reason why the Chicago ordinance was unconstitutional is that it reaches a broad range of innocent conduct, 119 S.Ct., at page 1865. As has already been shown, *Section 653.22(b)(3)* allows someone to be arrested and convicted regardless of how innocent the actual purpose for being on the street is, so long as that individual has sustained a conviction for a prostitution-related offense within the preceding five years, App. 18.

Also concurring in *Morales*, Justice Breyer stated that a reason that the ordinance must be found unconstitutional is not because a police officer applied discretion wisely or not in a particular case. The ordinance was unconstitutional because it vested police with too much discretion in every case, 119 S.Ct., at page 1866. Surely, the same constitutional flaw exists in *653.22*. The excess discretion vested in police by this statute is exacerbated by *subsection (c)* thereof, App. 19, which allows police to consider any other relevant circumstance, over, above, and beyond the statute's enumerated categories of conduct. The statute then goes on to say that whether an arrestee had the requisite intent to loiter with the intent to commit prostitution must be determined on an evaluation of the particular circumstances of each case. Yet, *653.22(c)* gives no boundaries or clear definitions as to the criteria that can be considered in determining if a violation occurred, App. 19.

Further concurring in *Morales*, Justice O'Connor referred to how the Chicago ordinance failed to provide minimal guidelines to govern law enforcement, 119 S.Ct., at page 1863. As shown throughout this Petition, *653.22* lacks guidelines that would be sufficient to steer police clear of making arbitrary decisions.

The Appellate Division stated that a distinction between the ordinance in *Morales* and *California Penal Code Section 653.22* is that the Chicago ordinance did not distinguish between innocent loitering and loitering threatening harm, whereas *653.22* explicitly prohibits loitering with the intent to commit prostitution, App. 4. This misses the point.

The constitutional problem with *653.22* is that it is vague, overbroad, and open ended in the criteria that it permits law enforcement to use in deciding whether or not to make an arrest. The Appellate Division further states that while the Chicago ordinance provided unfettered discretion to police to determine what conduct constituted loitering, *653.22* sets forth guidelines for determining whether the statute has been violated, App. 4. The Appellate Division is wrong, though, because these guidelines are hopelessly vague and overbroad. Additionally, *653.22(c)* allows police to look even beyond the statute's enumerated guidelines and use open ended and unlimited criteria in determining if the statute has been violated, App. 19.

CONCLUSION

For the foregoing reasons, Petitioner Christine Ann Brackett prays that this Petition for Writ of *Certiorari* to the Court of Appeal for the State of California, Second Appellate District, be granted.

Dated: June 5, 2000

Respectfully submitted,

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Counsel of Record
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Counsel for Petitioner
Christine Ann Brackett

APPENDIX A

APPELLATE DIVISION OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRISTINE ANN BRACKETT, Defendant and Appellant.	Superior Ct. No. BR 38481 Municipal Court of the Los Angeles Judicial Dist. No. 8WL01992 **MEMORANDUM JUDGMENT** (Filed Nov. 03, 1999)

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Appellant appeals from a conviction for loitering with intent to commit prostitution (Pen. Code, § 653.22, subd. (a)).

Appellant was charged with loitering with intent to commit prostitution (Pen. Code, § 653.22, subd. (a)). Appellant moved to dismiss the complaint on the ground Penal Code section 653.22 was unconstitutionally vague and overbroad. The People opposed the motion to dismiss. Following a hearing on the matter, the trial court denied the motion to dismiss based on the holding in *People* v. *Pulliam* (1998) 62 Cal.App.4th 1430. Appellant

pleaded no contest to the charge, imposition of sentence was suspended and appellant was placed on 36 months summary probation on various terms and conditions. Appellant filed a timely notice of appeal from the judgment.

Appellant first contends her statements were obtained in violation of *Miranda*.[1] However, appellant waived the right to raise this issue by entering a no contest plea. " '[A] plea of guilty waives any right to raise questions regarding the evidence, including its sufficiency or admissibility, and this is true whether or not the subsequent claim of evidentiary error is founded on constitutional violations.' " (*People* v. *Halstead* (1985) 175 Cal.App.3d 772, 778; see also *People* v. *Whitfield* (1996) 46 Cal.App.4th 947, 959; *People* v. *Gibbs* (1971) 16 Cal.App.3d 758, 765.)[2]

Appellant next contends Penal Code section 653.22 is unconstitutionally vague, overbroad, and violates due process. Appellant concedes the Court of Appeal for the Fourth District in *People* v. *Pulliam, supra,* 62 Cal.App.4th at pp. 1436-1438, determined the statute was not unconstitutionally vague or overbroad and did not violate due process. However, appellant urges this court to certify the case to the Court of Appeal for the Second District "so that a court other than the one that decided *Pulliam* will have an opportunity to construe [the] statute."

---

[1] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

[2] A no contest plea is the functional equivalent of a guilty plea. (*People* v. *Whitfield, supra,* 46 Cal.App.4th at p. 959.)

California Rules of Court, rule 63(a) provides in pertinent part that the superior court may certify that the transfer of a case to the court of appeal "appears necessary to secure uniformity of decision or to settle important questions of law." Here, however, since the court of appeal in *Pulliam, supra,* 62 Cal.App.4th 1430, upheld the constitutionality of Penal Code section 653.22 and there are no decisions in conflict with *Pulliam,* it is unnecessary to transfer the case to secure uniformity of decision or settle important questions of law. Accordingly, appellant's request to certify the case to the court of appeal is denied.

Appellant argues the United States Supreme Court's analysis of a gang ordinance in *Chicago* v. *Morales* (June 10, 1999) ___ U.S. ___ [1999 U.S. Lexis 4005, 67 U.S.L.W. 4415, 99 Daily Journal D.A.R. 5760] indicates Penal Code section 653.22 is unconstitutionally vague. We disagree.

In *Morales,* a Chicago ordinance required a police officer to issue a dispersal order when he observed "a person whom he reasonably believe[d] to be a criminal street gang member loitering in any public place with one or more other persons. . . . " The ordinance defined "loitering" as "remain[ing] in any one place with no apparent purpose." The Supreme Court determined the ordinance did not provide the kind of notice that would enable ordinary people to understand what conduct was prohibited because it failed to distinguish between innocent loitering and loitering threatening harm. Additionally, the Supreme Court determined that since the ordinance provided absolute discretion to police officers to determine what conduct constituted loitering, the ordinance violated the requirement that a legislature establish

minimal guidelines to govern law enforcement. In view of the foregoing, the Supreme Court determined the ordinance was unconstitutionally vague.

The ordinance in *Morales, supra,* is distinguishable from the statute at issue here. While the ordinance failed to distinguish between innocent loitering and loitering threatening harm, Penal Code section 653.22 prohibits loitering "with the intent to commit prostitution." Additionally, while the ordinance in *Morales* provided unfettered discretion to police officers to determine what conduct constituted loitering, Penal Code section 653.22 sets forth guidelines for determining whether the statute has been violated (Pen. Code, § 653.22, subd. (b)). Thus, the Supreme Court's decision in *Morales, supra,* does not compel the conclusion that Penal Code section 653.22 is unconstitutionally vague.[3]

The judgment is affirmed.

/s/ Schiavelli
Schiavelli, P.J.

We concur.

/s/ Todd
Todd, J.

/s/ Beverly, J.
Beverly, J.

---

[3] Additionally, the case submitted by appellant's counsel during oral argument, *People* v. *Janani* (1999) Daily Journal D.A.R. 10259, which involved a form of artistic expression protected by the First Amendment, is inapposite and does not undermine the holding in *People* v. *Pulliam, supra,* 62 Cal.App.4th at pp. 1436-1438.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRISTINE ANN BRACKETT, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	) B137783 (Super. Ct. No. BR38481) (George P. Schiavelli, Kathryn Doi Todd, William C. Beverly, Judges)

ORDER

(Filed Jan. 4, 2000)

THE COURT:*

The petition for writ of habeas corpus filed December 28, 1999, has been read and considered and is denied. (*People* v. *Pulliam* (1998) 62 Cal.App.4th 1430.)

/s/ C.S. Vogel /s/ J. Hastings /s/ J. Curry

*VOGEL (C.S.), P.J. HASTINGS, J. CURRY, J.

APPENDIX C

SUPREME COURT OF THE STATE OF CALIFORNIA

No. S085071

Court of Appeal No. 2d Criminal No. B137783

Los Angeles Superior Court No. **BR38481**

(Filed Jan. 13, 2000)

CHRISTINE ANN BRACKETT,

Petitioner and Defendant

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES, APPELLATE DEPARTMENT

Respondent

THE PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest

PETITION FOR REVIEW
OF DECISION OF THE SECOND APPELLATE DISTRICT, DIVISION FOUR, DENYING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS
Vogel (C.S.) P.J.: Hastings, J.: and Curry, J.

ORIGINALLY APPEALED TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT FROM WEST LOS ANGELES MUNICIPAL COURT
Case No.: **8WL01992,**
Honorable Joseph S. Biderman, Presiding

EDWARD TABASH, Attorney at Law,
Cal State Bar No. 72879
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Counsel of Record for Petitioner:
CHRISTINE ANN BRACKETT

* * *

APPENDIX D

Second Appellate District, Division Four, No. B137783
S085071

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

CHRISTINE ANN BRACKETT, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

THE PEOPLE, Real Party In Interest

(Filed Mar. 15, 2000)

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX E

BOOKING NO.	U.O.	LOC. BKD.
5640889		4214

DR.LIC.NO.	STATE	MT
N6035631	CA	N

ARRESTEE'S LAST NAME	FIRST	MIDDLE	SUF.
BRACKETT	CHRISTINE	ANN	

ADDRESS 3827 SPAD PL APT. NO.

CITY CULVER CITY STATE CA

SEX	DESCENT	HAIR	EYES
F	W	BLN	BLU

HEIGHT	WEIGHT	BIRTHDATE	AGE
500	135	102859	38

VEH. LIC. NO. STATE R.D. 9999 AKA: LAST-

FIRST-
OR NICKNAME

BIRTHPLACE STA MONICA CA
LOS ANGELES US

PROB. INV. UNIT CT

JUV. DETAINED AT

AD. CHG N

DIVISION AND	DETAIL ARRESTING
4214	VICE

DATE ARRESTED	TIME ARR.	TIME BKD.
050198	2130	2243

LOCATION OF ARREST LINCOLN BL
BROADWAY

BAIL 500

TOTAL BAIL 500

DR.

TYPE. CHARGE & CODE
M 653.22PC

DEFINITION WARRANT NO. ☆

LOITER ENG PROST

ADDITIONAL CHARGES (ON ADDL. WARRS. LIST NO., COURT, AND BAIL, INCL. P.A.)

SOCIAL SECURITY NO.
573217557

ARRAIGN. DATE
052998

TIME
0830

COURT
DIV 90

LOCATION CRIME COMMITTED

R.D.

RESIDENCE PHONE NO.
310-8425515

EMPLOYER/SCHOOL

[ ] SHOTS FIRED

OCCUPATION/GRADE
UNEMPLOYED

PHY. ODD.
TT: ROSE, LFT HAND; BUTTERFLY, L ANKLE

CLOTHING WORN
BLK SHS, GRN PNTS, BLU JKT

EXACT LOCATION/DISPOSITION ARRESTEE'S VEHICLE
PED

HOLD FOR:

LIST CONNECTING APTS BY TYPE & IDENTIFYING NOS
RFC #275387

VEHICLE USED (YEAR, MAKE, MODEL, TYPE, COLORS, LIC. NO., ID MARKS)
89 FORD ASTRO VAN WHT 3BJH465

PASSENGERS
M 0

F 1

COMPLAINTS/EVID OF ILLNESS/INJ-BY WHOM TREATED
NONE

DRIVING VEH. (DIRECTIONS & NAME OF STREET) AT OR BETWEEN STREETS

RETAINED
ALL

CASH DEPOSITED
NONE

[ ] USE OF FORCE

INVOLVED PERSONS

Code:

V: VICTIM

W: WITNESS

P/A: ARRESTING PRIVATE PERS.

TO: TRUE OWNER

R: PERSON RPTG.

459: S – PERSON SECURING
JUV: D – PERSON DISCOVERING
P – BOTH PARENTS
G – GUARDIAN

NAME V & W'S

CDL #CS415656
W SINGH, GYAN

SEX
M

DESC.
0

D.O.B.
12-12-51

ADDRESS
R 1531 16TH ST,

CITY
SANTA MONICA CA

ZIP

B 2101 LINCOLN BL,
LOS ANGELES CA

PHONE DAY X
(310) 515-5773 X

* * *

APPROVAL/REPORTING OFFICERS

SUPERVISOR APPROVING REPORT

SGT ROBERT CUSHNIE

SERIAL NO.

20266

DATE & TIME REPRODUCED

5/2/1700

DIV

___

CLERK

C4 N

RAP SHEET ATTACHED

[X] YES [ ] NO

REPORTING OFFICER(S)

ELDRIDGE

SERIAL NO.

27198

DIV. & DETAIL

14VY

VACATION

JULY PAST

* * *

2 Arrest Booking # 5640889 DR# 9814-

Deft: Brackett, Christine Ann

Arresting Officer: Eldridge #27198

Assisting Officer: Alarcon #30383

Source of Activity:

I, Ofcr Eldridge, along with my partner Officer Alarcon were assigned Pacific Area Vice working plain clothes and were driving plain cars. We were in the vicinity of Lincoln Bl and Marco Pl monitoring the location for prostitution, lewd conduct, and loitering for prostitution activity. Pacific Vice has received numerous citizen complaints regarding these activities, and numerous arrests have been made for same.

During my tenure at Pacific Vice I have made, or assisted in making numerous arrests for prostitution. I have received formal training in prostitution activity at the LAPD vice school, and from Pacific Area Vice supervisors specific to the LAPD enforcement policy regarding 653.22 of the Penal Code (loitering for the purpose of engaging in a prostitution offense).

On 04/23/98 at 2130 hrs Officer Alarcon observed the Deft walking N/B on Lincoln Bl and Veronon St. Officer Alarcon observed the Deft monitoring vehicles with lone male passengers and waving them to the sidewalk. These actions are consistent with that of a street walking prostitute. Officer Alarcon approached the Deft and made eye contact, and the Deft waved him to the sidewalk. Deft then entered the right front passenger side of the vehicle (uninvited) and the following conversation ensued;

Ofcr: Hi.

Deft: Hello.

Deft: What's up?

Ofcr: Just looking for some fun.

Deft: Are you a cop?

OFcr: No.

Deft: If your not a cop than touch me.

Ofcr: Touch you where?

Deft: Touch me here. (Opening jacket to expose breast area).

Ofcr: I'll touch you, but not here.

Deft: If you won't touch me than I'm getting out of the car. (Deft exited the vehicle).

Officer Alarcon stated that in his opinion the Deft believed that he was a Vice Officer based on her reactions and statements. Officer Alarcon advised me of the incident and we detained the Deft to warn her for 653.22 PC-Loitering for prostitution. Officers completed the prostitute contact record report and had the Deft sign the form. Deft was advised that she was not to work as a prostitute for sixty days on Lincoln Bl between Machado Dr and Washington Bl or she would be in violation 653.22 PC and could be arrested on that charge. (C-attached prostitute contact record)

Observations:

On 05-01-98 at approx 2130 hrs, I, Officer Eldrige and Officer Alarcon observed the Deft walking N/B Lincoln Bl at Marco Pl monitoring vehicles with lone male passengers. Officers observed the Deft wave a vehicle (89 For Astro Van Wht LIC 3BJH465) to the sidewalk. The Deft entered the vehicle, and Officers followed the vehicle to Lincoln Bl and Broadway where the vehicle parked. Officers approached the vehicle and Officer Alarcon contacted the driver (wit) who stated that he had dated the Deft several times and that they were going to get a hotel room. The wit stated that he had not discussed a price with the Deft. Officer Eldridge spoke with the Deft who spontaneously stated "My husband is disabled, I do this so we can eat, please don't take me to jail. I promise you won't see me out here working again, can't you warn me like the other night".

Based on the fact that Deft had been warned within the last sixty days for 653.22 PC, I formed the opinion that the Deft was in violation of 653.22PC – loitering for the purpose of engaging in a prostitution offense. The Deft was taken into custody without incident.

Arrest:

I arrested the Deft for 653.22PC – loitering for the purpose of engaging in a prostitution offense. The Deft was transported to Pacific Station.

Booking:

The Deft was booked for the above charge at Pacific Jail on the advice of Sgt Cushnie #20266.

Additional: A stand up polaroid photo of the Deft was taken and attached to this report. Working is S/V for prostitution. Wit-1 (Singh, Gyan 12-12-51) was questioned and released.

APPENDIX F

CALIFORNIA PENAL CODE SECTION 653.22

§ 653.22. Offense; intent; relevant circumstances

(a) It is unlawful for any person to loiter in any public place with the intent to commit prostitution. This intent is evidenced by acting in a manner and under circumstances which openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution.

(b) Among the circumstances that may be considered in determining whether a person loiters with the intent to commit prostitution are that the person:

(1) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution.

(2) Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or, making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution.

(3) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, or any other offense relating to or involving prostitution, within five years of the arrest under this section.

(4) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists, indicative of soliciting for prostitution.

(5) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision, with the exception of paragraph (3), or in any other behavior indicative of prostitution activity.

(c) The list of circumstances set forth in subdivision (b) is not exclusive. The circumstances set forth in subdivision (b) should be considered particularly salient if they occur in an area that is known for prostitution activity. Any other relevant circumstances may be considered in determining whether a person has the requisite intent. Moreover, no one circumstance or combination of circumstances is in itself determinative of intent. Intent must be determined based on an evaluation of the particular circumstances of each case.

(Added by Stats. 1995, c. 981 (A.B.1035), § 4.)